CITATION: Maccaroni v. Kelly, 2011 ONCA 411
DATE: 20110530
DOCKET: C52651

COURT OF APPEAL FOR ONTARIO

MacFarland, Rouleau and Epstein JJ.A.

BETWEEN

Mary Maccaroni, Rocco Maccaroni, Angela Maccaroni, Kathryn Maccaroni, Barbara Maccaroni and Peter Maccaroni

Plaintiffs (Appellants)

and

Kevin Kelly, Donna Ainsworth and ING/Halifax Insurance Company of Canada

Defendants (Respondent)

and

The Co-Operators General Insurance Company added by Order pursuant to s. 258(14) of the *Insurance Act*, R.S.O. 1990, c. I.8 as amended

Third Party

William G. Scott, for the appellants

Donald G. Cormack, for the respondent

No one appearing, for the third party

Heard: March 2, 2011

On appeal from the order of Justice Patrick J. Flynn of the Superior Court of Justice dated August 13, 2010, with reasons reported at 2010 ONSC 4447.

MacFarland J.A.:

[1] This is an appeal from the order of Flynn J. dated August 13, 2010, wherein he dismissed the within action and ordered costs to be determined and fixed following receipt of written submissions.

[2] For the reasons that follow, I would allow the appeal, set aside the order of Flynn J. and in its place an order shall issue dismissing the respondent's motion for summary judgment.

THE FACTS

[3] The appellant, Mary Maccaroni, alleges she was injured in a motor vehicle accident that occurred on February 16, 2003, when the car in which she was a passenger was rear-ended by a vehicle operated by Kevin Kelly and owned by his mother Donna Ainsworth.

[4] At the time of the accident, the Ainsworth vehicle was insured by the Co-operators General Insurance Company (Co-operators). That policy had third party liability limits of $1,000,000.

[5] The Maccaronis' vehicle was at the time insured by ING/Halifax Insurance Company of Canada (ING). That policy had what is known as an OPCF 44R endorsement. This endorsement provided additional coverage in the event that injuries were occasioned to the policyholder in circumstances where the tortfeasor was either

uninsured or underinsured, in the sense that the limits of coverage under OPCF 44R were greater than the third party liability limits of coverage available to the tortfeasor. The OPCF 44R endorsement also had coverage limits of $1,000,000.

[6] The appellants issued a statement of claim on October 1, 2003. In that claim, the appellants named the tortfeasors Kevin Kelly and his mother, Donna Ainsworth, the operator and owner, respectively, of the Ainsworth vehicle. They also named ING, Ms. Maccaroni's own insurer, pursuant to the OPCF 44R endorsement.

[7] Co-operators obtained an order adding itself as a statutory third party pursuant to the provisions of s. 258 of the *Insurance Act*, R.S.O. 1990 c. I.8. It took the position that Mr. Kelly's driver's licence was suspended at the time of the accident and that Ms. Ainsworth permitted Mr. Kelly to operate her motor vehicle when she knew or ought to have known that Mr. Kelly did not have a valid driver's licence. Co-operators further alleged that neither Mr. Kelly nor Ms. Ainsworth co-operated in the investigation of the action.

[8] In view of the breach of statutory conditions it alleged, Co-operators denied liability under its contract of insurance and took the position that its liability to third parties was limited to $200,000 pursuant to s. 258(11) of the *Insurance Act*.

[9] Thereafter, the appellants settled their action with the tortfeasors and Co-operators in exchange for the statutory minimum limits of $200,000. ING neither consented to the

settlement nor to the dismissal of the action against the tortfeasors and Co-operators.[1] ING took the position that the appellants' damages, in any event, did not exceed the $200,000 they had been paid by Co-operators, and specifically rejected the off-coverage position Co-operators had taken. As part of the settlement, Ms. Maccaroni signed a final release wherein she specifically released Kevin Kelly, Donna Ainsworth and the Co-operators in respect of any and all claims arising out of the February 16, 2003 motor vehicle accident. Further, she agreed that the payment did not constitute any admission of liability on the part of the three releasees and declared that the payment was:

> [A]ccepted voluntarily for the purpose of making a full and final compromise, adjustment and settlement of all claims for losses and damages resulting or to result from the said incident.

[10] The appellants then sought to recover the additional money to which they claimed entitlement from ING pursuant to the OPCF 44R endorsement.

[11] On March 18, 2010, ING brought a motion for summary judgment, pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the appellants' action as against ING on the grounds that there was no genuine issue for trial.

[12] At the motion, ING took the position that there had never been a legal determination of the off-coverage position taken by Co-operators and, accordingly, Co-

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[1] As originally filed on December 6, 2005, the consent to the dismissal of the action included the dismissal of the appellants' claim not only as against the tortfeasors and Co-operators but also as against ING. On September 12, 2008, the appellants brought a motion for an order setting aside the dismissal as against ING. Harris J. allowed the motion, finding that the appellants' solicitor had inadvertently filed a consent to the dismissal of the entire claim. On August 7, 2009, ING's motion for leave to appeal the order setting aside the dismissal to the Divisional Court was dismissed.

operators' limit of liability was never reduced by "operation of law" or otherwise from the certificate amount of $1,000,000 to the statutory minimum limit of $200,000.

[13] Further, ING argued that no such legal determination could now be made because the appellants had released both tortfeasors and Co-operators from the action.

[14] The motion judge accepted both positions argued by ING. He found there was no genuine issue requiring a trial and granted summary judgment dismissing the action against ING.

ANALYSIS

[15] The OPCF 44R endorsement is intended to protect an insured policyholder in the event she is involved in an accident in circumstances where the limit of liability she has under this endorsement is greater than the third party liability limits of the tortfeasor whose actions caused her injuries. In the event the policyholder's damages exceed the third party liability coverage, then the policyholder can recover from her own insurer under the OPCF 44R endorsement to her own policy.

[16] The endorsement provides:

> 1.5 "inadequately insured motorist" means
>
> > (a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance … obtained by the owner or driver is less than the limit of family protection coverage…
>
> 1.8 "limit of motor vehicle liability insurance" means the amount stated in the Certificate of Automobile Insurance as

> the limit of liability of the insurer with respect to liability claims, regardless of whether the limit is reduced by the payment of claims or otherwise;
>
> PROVIDED THAT in the event an insurer's liability under a policy is reduced by operation of law to the statutory minimum limits in a jurisdiction because of a breach of the policy, the statutory minimum limits are the limits of motor vehicle liability insurance in the Policy.

[17] The insuring agreement of the OPCF 44R provides that:

> 3. … the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to or death of an insured person arising directly or indirectly from the use or operation of an automobile.

[18] The Co-operators' policy has a third party liability limit of $1,000,000. The ING OPCF 44R endorsement also has a limit of $1,000,000.

[19] The issue here is really whether the Co-operators' liability limits are "reduced by operation of law" merely on its say so or because of a settlement reached without the consent of the OPCF 44R insurer. In other words, is it enough to allege breach of policy conditions to reduce the liability limits of coverage available to pay third party claimants and then settle by paying the reduced limits? I think not. The words "by operation of law" must have some meaning beyond a liability insurer merely taking an off-coverage position and settling on this basis. The third party liability coverage is intended as first loss insurance and the OPCF 44R as excess. Therefore, there must be a legal

determination that the third party liability coverage has been limited before the OPCF 44R excess coverage becomes available.[2]

[20] By alleging policy violation and adding itself as statutory third party, the insurer who takes an off-coverage position, as Co-operators did here, merely preserves its position. It will then be an issue to be determined in the subsequent litigation. If the insurer's position is borne out by the evidence and it is proved, on a balance of probabilities, that the insured has breached the conditions of the policy, then the liability policy limits will be reduced accordingly by virtue of s. 258(11) of the *Insurance Act* to the statutory minimum limits. It is the effect of s. 258(11) of the Act that reduces the limits of the policy to the statutory minimum where it is determined there has been a breach of a policy condition "by operation of law". Until there is a finding, however, the insurer's allegation of policy violation is merely that, an unproved allegation, and the policy limit will remain that set out in the insured's policy.

[21] I agree with the motion judge's conclusion set out in para. 25 of his reasons:

> I agree with ING that there never has been a legal determination with respect to the off-coverage position taken by Co-operators and that therefore Co-operators limit of liability was never reduced by *operation of law* from the Certificate amount of a million dollars to the statutory minimum of $200,000.

[22] The only remaining question is whether the appellants' action against ING can proceed. The motion judge held it could not. He concluded at para. 26 of his reasons:

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[2] See s. 7 of the OPCF 44R endorsement.

> And I further agree with ING's argument that no such legal determination can now be made, since the plaintiff has released the tortfeasors and Co-operators from this action.

[23] The motion judge was of the view that the Co-operators' off-coverage position could only be determined in an action where Co-operators and its policyholders, the tortfeasors, were parties. I do not agree with this conclusion. In my view, there is no reason why the appellants' action against ING may not proceed. It will be for the appellants to prove their entitlement to recover from ING and they will have to prove Co-operators' off-coverage position in order to do so. The fact that Co-operators and the tortfeasors are not parties to the proceeding is of no moment. The tortfeasors and representatives of Co-operators can be called as witnesses and can be examined under oath as non-parties: see rules 31.10 and 53.04 of the *Rules of Civil Procedure*. While a factual finding made in respect of the coverage issue will bind neither Co-operators nor the tortfeasors vis-à-vis the appellants in view of the release, such a finding can determine, as between the appellants and ING, whether the appellants are entitled to recover anything from ING. If the appellants are successful and establish that the tortfeasors were in breach of their policy provisions and hence, that the off-coverage position taken by Co-operators is correct, they may be entitled to recover from ING. If they are not successful, their action will be dismissed and they will, absent exceptional circumstances, be liable for the costs of those proceedings.

[24] Furthermore, it is, I think, arguable on the basis of the Supreme Court of Canada's decision in *Somersall v. Friedman*, [2002] 3 S.C.R. 109, that the appellants may well

have a claim against ING in spite of their settlement agreement with Co-operators and the tortfeasors. The plaintiffs in *Somersall* had settled their claims with the third party liability insurer for the policy limits and agreed not to pursue the tortfeasor for any amount over those limits. They then sought to recover their damages, over and above those policy limits from their own insurer under a SEF 44 endorsement (similar to a OPCF 44R endorsement). The majority concluded, on the facts of that case, that the plaintiffs' settlement did not bar their right to pursue their own insurer for damages claimed above the settlement figure.

[25] This is not to say, however, that an argument cannot be made that *Somersall* does not apply. The facts in *Somersall* differ from the facts in this case. Significantly, in *Somersall*, the plaintiffs' agreement with the third party liability insurer was for the full limits of that policy – there is no suggestion that the agreement was for minimum statutory limits only.[3] That, of course, is not this case where there is a potential of an additional $800,000 of coverage available as excess insurance. It is significant that in *Somersall* there was no issue that the tortfeasor was inadequately insured. His policy limits were less than the SEF 44 limits and accordingly all the insured claimants had to prove in their claim against their insurer (SEF 44 insurer) was that they were: "Legally entitled to recover from an inadequately insured motorist." Further, the court in *Somersall* seemed to lay particular emphasis on the fact that the tortfeasor had no "capacity to compensate" the plaintiffs or was "impecunious". The record in the present case does not

[3]It will be recalled that the date of the motor vehicle accident in *Somersall* was January 29, 1989.

show whether the tortfeasors are impecunious. Thus, it would seem, the law is not settled on this point.

[26] In my view, it is not plain and obvious that there is no genuine issue requiring a trial. The appellants should be permitted to continue their suit against ING. ING may raise any defences it deems appropriate.

[27] For these reasons, I would allow the appeal, set aside the order of the motions judge and in its place an order shall issue dismissing the motion of the respondent, ING.

[28] Costs of the appeal, to the appellants fixed in the sum of $7,500, inclusive of disbursements and H.S.T., a figure to which counsel have agreed.

[29] By agreement of counsel the setting of the costs of the motion below is remitted to the motion judge for determination.

RELEASED: May 30, 2011 “JMacF”

“J. MacFarland J.A.”
“I agree Paul Rouleau J.A.”
“I agree Gloria Epstein J.A.”